Performance and Conduct Standards



Employers typically establish job-related requirements, the specific tasks or assignments that an employee must perform, and methods to evaluate performance. Evaluation criteria might take into account how well an employee is performing both essential and marginal functions and whether the employee is meeting basic job requirements (e.g., working well with others or serving customers in a professional manner). Employers might also enforce conduct standards (e.g., rules prohibiting destruction of company property or the use of company computers to access pornography). Certain performance and conduct standards will apply to all employees working for a company, organization, or government agency; others might only apply to certain offices or jobs within an entity.

PERFORMANCE STANDARDS

1. May an employer apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities?

Yes. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering

or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation. However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.

Practical Guidance: It is advisable for employers to give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it.

- Example 1: A federal agency requires all of its investigators to complete 30 investigations per year in addition to other responsibilities. Jody's disability is worsening, causing her increased difficulty in completing 30 investigations while also conducting training and writing articles for a newsletter. Jody tells her supervisor about her disability and requests that she be allowed to eliminate the marginal functions of her job so that she can focus on performing investigations.

- After determining that conducting trainings and writing articles are marginal functions for Jody and that no undue hardship exists, the agency reassigns Jody's marginal functions as a reasonable accommodation.
- Example 2: Robert is a sales associate for a pharmaceutical company. His territory covers a 3state region and he must travel to each state three times a year. Due to staff cutbacks, the company is increasing the number of states for each salesperson from three to five. Robert explains to his manager that due to his disability he cannot handle the extra two states and the increased traveling, and he asks that he be allowed to have responsibility only for his original three states. The company may refuse this request for accommodation because it conflicts with the new production standard. However, the company should explore with Robert whether there is any reasonable accommodation that could enable him to service five states, and if not, whether reassignment is possible.
- Example 3: A computer programmer with a known disability has missed deadlines for projects, necessitating that other employees finish his work. Further, the employee has not kept abreast of changes in the database package, causing him to misinterpret as system problems changes that he should have known about. The employee is placed on a Performance Improvement Plan, but his performance does not improve and he is terminated. At no time does the employee request a reasonable accommodation (i.e., inform the employer that he requires an adjustment or change as a result of a medical condition). The termination is justified as long as the employer holds the employee to the same performance standards as other programmers.

2. May an employer use the same evaluation criteria for employees with disabilities as for employees without disabilities?

Yes. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.

Practical Guidance: An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem. This may lead the employee to request reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer.

- Example 4: Last year Nicole received an "above average" review at her annual performance evaluation. During the current year Nicole had to deal with a number of medical issues concerning her disability. As a result, she was unable to devote the same level of time and effort to her job as she did during the prior year. She did not request reasonable accommodation (i.e., inform the employer that she requires an adjustment or change as a result of a medical condition). The quantity and quality of Nicole's work were not as high and she received an "average" rating. The supervisor does not have to raise Nicole's rating even though the decline in performance was related to her disability.

3. May a supervisor require that an employee with a disability perform a job in the same manner as a non-disabled employee?

Not necessarily. In many instances, an essential function can be performed in different ways (including with reasonable accommodation). An employee who must

use an alternative method of performance because of a disability must be evaluated accordingly. However, an employer is not required to allow use of an alternate method that would impose an undue hardship.

- Example 5: One of Rhoda's essential functions is providing training. Because she is deaf and, as a result, has difficulty speaking, Rhoda uses a sign language interpreter to voice for her. Generally, Rhoda's supervisor evaluates his employees on the use of their voices – whether they speak with a monotone or use their voices to show interest and enthusiasm. Rhoda's presentation cannot be measured in this way. However, there are alternative ways to measure how she conveys her message, including body language, facial expression, and the words she uses.
- Example 6: Daniel works as a millwright, and an essential function of his job is repairing and maintaining equipment. Most of the equipment is accessible only by climbing ladders and steps. Due to a recent disability, Daniel no longer can climb and must work only at ground level. The location of the equipment does not allow alternative means to elevate Daniel (e.g., using a cherry picker). With no reasonable accommodation possible, Daniel cannot repair the equipment (an essential function). Daniel is not "qualified" to remain in this position and the employer should explore whether it can reassign him as a reasonable accommodation.

4. If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?

Yes. The rating reflects the employee's performance regardless of what role, if any, disability may have played. [See Example 4.]

Practical Guidance: If an employee states that her disability is the cause of the performance problem, the employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance. If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level.

5. Must an employee with a disability ask for a reasonable accommodation at a certain time?

No. The ADA does not compel employees to ask for accommodations at a certain time. Employees may ask for reasonable accommodation before or after being told of performance problems. Sometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance.

Practical Guidance: Ideally, employees will request reasonable accommodation before performance problems arise, or at least before they become too serious. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance.

- Example 7: Nasser, an employee at a nonprofit organization, recognizes soon after he begins working that he is having difficulty following

conversations at meetings because of his deteriorating hearing. Nasser's hearing aid helps him when talking directly to one person, but not when he is in a large room with many people participating in a discussion. Nasser believes that he could follow the group discussions if the employer provided a portable assistive listening device. He tells his supervisor that a simple assistive listening system would include an FM transmitter and microphone that could be placed at the center of a conference table and an FM receiver and headset that he would wear. The system would amplify speakers' voices over the headset without affecting the way other meeting participants would hear the conversation. The employer provides the reasonable accommodation and Nasser now performs all of his job duties successfully.
- Example 8: A county government employee does not disclose her chronic fatigue syndrome, even when she begins having performance problems that she believes are disability-related. Her supervisor counsels her about the performance problems, but they persist. The supervisor warns that if her work does not show improvement within the next month, she will receive a written warning. At this point, the employee discloses her disability and asks for reasonable accommodation.

The supervisor should discuss the request and how the proposed accommodation will help improve the employee's performance. The supervisor also may ask questions or seek medical documentation that the employee has a disability. The supervisor does not need to rescind his oral warning or his requirement that the employee's performance must improve. However, delaying the one-month period to evaluate the employee' performance pending a decision on her request for reasonable accommodation will enable the employer to assess the employee's performance accurately.

- Example 9: An employee with a small advertising firm has a learning disability. Because the employee had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations during the application process or once he begins working. Performance problems soon arise, and the employee's supervisor brings them to the employee's attention. He tries to solve the problems on his own, but cannot. The firm follows its policy on counseling and disciplining employees who are failing to meet minimum requirements, but these efforts are unsuccessful. When the supervisor meets with the employee to terminate his employment, the employee asks for a reasonable accommodation. The employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. Once an employer makes an employee aware of performance problems, the employee must request any accommodations needed to rectify them. This employee waited too long to request reasonable accommodation.

6. What should an employer do if an employee requests an accommodation for the first time in response to counseling or a low performance rating?

When an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer may proceed with he discussion or evaluation but also should begin the "interactive reasonable accommodation process" by discussing with the employee

how the disability may be affecting performance and what accommodation the employee believes may help to improve it. Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem. If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the employer refuses to provide one, absent undue hardship, the employer has violated the ADA.

The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem. The employer may also suggest possible accommodations.

The employee may need reasonable accommodation, for example, to enable him to meet a production standard or to perform an essential function. Where a lower performance rating results from an inability to perform a marginal function because of the disability, the appropriate accommodation would be to remove the marginal function (and perhaps substitute one that the employee can perform).

Practical Guidance: Employers find the "interactive process" helpful in clarifying what accommodation an employee is seeking and how it would help to correct a performance problem. The topics for discussion will vary depending on what information an employer requires to respond to a request for reasonable accommodation, but failing to raise questions may leave an employer at a disadvantage in making an informed decision. Furthermore, an employer might learn that alternative accommodations may be effective in meeting the employee's needs. When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer: tolerate or excuse the poor performance; withhold disciplinary action (including termination) warranted by the poor performance; raise a performance rating; or give an evaluation that does not reflect the employee's actual performance.

- Example 10: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, "You should not have waited until problems developed to tell me about your disability." Odessa's delay in requesting an accommodation does not justify the employer's refusal to provide one. If a reasonable accommodation will help improve the employee's performance (without posing an undue hardship), the accommodation must be provided.
- Example 11: A federal employee is put on a 60-day Performance Improvement Plan (PIP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the PIP and immediately discusses the request with the employee, enlisting the agency's Disability Program Manager (DPM) in the interactive process. The supervisor and DPM determine that a reasonable accommodation might help address the employee's performance problems. The supervisor arranges for the reasonable accommodation and the 60-day PIP commences.

The employer did not have to cancel the PIP because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an accommodation until being placed on a PIP

does not relieve the agency of its obligation to provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.

The temporary postponement of the PIP to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance. If the employer determines that the employee is not entitled to a reasonable accommodation (e.g., the employee does not have a "disability"), the employee should be so informed and the PIP should begin.

Requests for reasonable accommodation should be handled expeditiously, in particular because unnecessary delays in determining or providing an effective accommodation may violate the ADA. In this Example the supervisor recognized the need to address the request promptly so as not to unnecessarily delay the commencement of the PIP.

Practical Guidance: An employer may need to determine what happens to an employee while it is handling a request for accommodation. For example, an employer might require an employee to perform only those functions of the job for which accommodation is not needed while processing the request. In other situations, it may be appropriate for an employee to take leave.

7. May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?

No. An employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation. If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted.

CONDUCT STANDARDS

8. May an employer discipline an employee with a disability for violating a conduct standard?

Yes. If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees. In most instances, an employee's disability will not be relevant to any conduct violations.

- Example 12: A blind employee has frequent disputes with her supervisor. She makes personal phone calls on company time, despite being told to stop. She

routinely walks away from the job to smoke a cigarette despite warnings that she can do so only on breaks. She taunts the supervisor and disobeys his instructions regarding safe use of equipment. The employee's actions are unrelated to her disability and the employer may discipline her for insubordination.

- Example 13: Coworkers frequently taunt an employee with cerebral palsy because of his speech impediment, but the supervisor neither knows nor has reason to know about the taunting. Instead of reporting the coworkers' behavior to his supervisor or human resources department, the employee goes into the offices of his coworkers and destroys some of their property. The employer may discipline the employee for his inappropriate response. (Because management is now aware of the coworkers' actions, it must promptly investigate to determine whether they constitute harassment. If so, the employer must take appropriate action to prevent future harassment.)

9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.38 The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property

Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work); prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work; require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and prohibit drinking or illegal use of drugs in the workplace. [See Question 26.] Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.

The following examples illustrate how different results may follow from application of these factors in specific contexts.

- Example 14: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers46 and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.
- Example 15: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics which do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.
- Example 16: Assume that Steve has all the severe tics mentioned in Example 14, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.
- Example 17: A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an

accommodation would assist her in complying with the code of conduct in the future.

- Example 18: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not jobrelated and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

Questions 10 – 15 assume that the conduct rule at issue is job-related and consistent with business necessity.

10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct. If an accommodation is requested, the employer should begin an "interactive process" to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective. The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting the employee's conduct, and what accommodations may address the problem.

Employers cannot refuse to discuss the request or fail to provide reasonable accommodation as a punishment for the conduct problem. If a reasonable accommodation is needed to assist an employee with a disability in controlling his behavior and thereby preventing another conduct violation, and the employer

refuses to provide one that would not cause undue hardship, then the employer has violated the ADA.

- Example 19: Tom, a program director, has successfully controlled most symptoms of his bipolar disorder for a long period, but lately he has had a recurrence of certain symptoms. In the past couple of weeks, he has sometimes talked uncontrollably and his judgment has seemed erratic, leading him to propose projects and deadlines that are unrealistic. At a staff meeting, he becomes angry and disparaging towards a colleague who disagrees with him. Tom's supervisor tells him after the meeting that his behavior was inappropriate. Tom agrees and reveals for the first time that he has bipolar disorder. He explains that he believes he is experiencing a recurrence of symptoms and says that he will contact his doctor immediately to discuss medical options. The next day Tom provides documentation from his doctor explaining the need to put him on different medication, and stating that it should take no more than six to eight weeks for the medication to eliminate the symptoms. The doctor believes Tom can still continue working, but that it would be helpful for the next couple of months if Tom had more discussions with his supervisor about projects and deadlines so that he could receive feedback to ensure that his goals are realistic. Tom also request that his supervisor provide clear instructions in writing about work assignments as well as intermediate timetables to help him keep on track. The supervisor responds that Tom must treat his colleagues with respect and agrees to provide for up to two months all of the reasonable accommodations Tom has requested because they would assist him to continue performing his job without causing an undue hardship.

Practical Guidance: Ideally, employees will request reasonable accommodation before conduct problems arise, or at least before they become too serious. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including termination) warranted by misconduct. Employees should not assume that an employer knows that an accommodation is needed to address a conduct issue merely because the employer knows about the employee's disability. Nor does an employer's knowledge of an employee's disability require the employer to ask if the misbehavior is disability-related.

- Example 20: An employee informs her supervisor that she has been diagnosed with bipolar disorder. A few months later, the supervisor asks to meet with the employee concerning her work on a recent assignment. At the meeting, the supervisor explains that the employee's work has been generally good, but he provides some constructive criticism. The employee becomes angry, yells at the supervisor, and curses him when the supervisor tells her she cannot leave the meeting until he has finished discussing her work. The company terminates the employee, the same punishment given to any employee who is insubordinate. The employee protests her termination, telling the supervisor that her outburst was a result of her bipolar disorder which makes it hard for her to control her temper when she is feeling extreme stress. She says she was trying to get away from the supervisor when she felt she was losing control, but he ordered her not to leave the room. The employee apologizes and requests that the termination be rescinded and that in the future she be allowed to leave the premises if she feels that the stress may cause her to engage in inappropriate behavior. The employer may

leave the termination in place without violating the ADA because the employee's request for reasonable accommodation came after her insubordinate conduct.

11. May an employer only discipline an employee whose misconduct results from a disability for conduct prohibited in an employee handbook or similar document?

No. An employer may enforce conduct rules that are not found in workplace policies, employee handbooks, or similar documents so long as they are: (1) job-related and consistent with business necessity, and (2) applied consistently to all employees and not just to a person with a disability.

Many times, the proscribed conduct is well understood by both the employer and employees as being unacceptable without being formally written, such as a prohibition on insubordination.

- Example 21: Mary's disability has caused her to yell at and insult her supervisor and coworkers. There is no formal policy addressing such conduct, nor need there be. Prohibiting an employee from acting belligerently towards a supervisor or coworkers is job-related and consistent with business necessity, and thus Mary's supervisor may discipline her as long as the same discipline would be imposed on a non-disabled employee for the same conduct. Sometimes, an employee's conduct may not be directly addressed by a conduct rule but nonetheless clearly violates a behavior norm that is job-related and consistent with business necessity.
- Example 22: Jane has Down syndrome and is employed as a bagger at a grocery store. Jane is very friendly and likes to hug customers as they leave. Although she means well, management finds this behavior is unacceptable. Jane's manager talks to her and also contacts the job coach who helped Jane learn to do her job. The manager explains the unacceptable behavior and as a reasonable accommodation has the job coach return to work with Jane for a few days until she learns that she cannot hug the customers.

It is job-related and consistent with business necessity to require that Jane refrain from hugging customers. Although the grocery store does not have a rule specifically prohibiting physical contact with customers, refraining from such conduct is an inherent part of treating customers with appropriate respect and courtesy.

- Example 23: Jenny has cerebral palsy which causes her hands to shake. The supervisor observes Jenny spilling some of her drink on the counter in the office kitchen, and notices that she fails to clean it up. The supervisor has observed non-disabled employees leaving a mess, but has never disciplined them for this behavior. Nevertheless, the supervisor tells Jenny she can no longer use the kitchen because of her failure to clean up the spill. Although Jenny's disability did not prevent her from cleaning up, singling Jenny out for punishment could be a violation of the ADA. On the other hand, the supervisor could have prohibited Jenny from using the kitchen if he had previously announced that employees would be required to clean up after themselves or risk being denied access to the kitchen.

Practical Guidance: Whether rules are written or not, employers should be careful that all conduct rules are applied consistently and should not single out an employee with a disability for harsher treatment. In addition, because ad

hoc rules are just that, ad hoc, an employer may have more difficulty demonstrating that they are job-related and consistent with business necessity.

12. May an employer require an employee to receive or change treatment for a disability to comply with a conduct standard?

No. Decisions about medication and treatment often involve many considerations beyond the employer's expertise.

Practical Guidance: Regardless of whether employers believe they are trying to help employees who have medical conditions, employers should focus instead on addressing unacceptable workplace conduct.

Employer comments about the disability and its treatment could lead to potential ADA claims (e.g., the employer "regarded" the employee as having a disability or the employer engaged in disparate treatment). Although employers should not intervene in medical decisions, they should be prepared to discuss providing a reasonable accommodation that will enable an employee to correct a conduct problem. The ADA requires an employer to provide reasonable accommodation regardless of what effect medication or other medical treatment may have on an employee's ability to perform the job. However, if an employee does not take medication or receive treatment and, as a result, cannot perform the essential functions of the position or poses a direct threat, even with a reasonable accommodation, she is unqualified. Similarly, if an employee does not take medication or receive treatment and, as a result, cannot meet a conduct standard, even with a reasonable accommodation, the employer may take disciplinary action.

- Example 24: An employee with a psychiatric disability takes medication, but one side effect is that the employee sometimes becomes restless. The employee's restlessness leads him to become easily distracted by nearby colleagues which, in turn, causes him to interrupt his coworkers. The supervisor counsels the employee about his disruptiveness and lack of focus. The employee tells the supervisor about his disability and the side effect of the medication he takes, and asks to be moved to a quieter work space to lessen the distractions. He also says that it would be helpful if his supervisor gave him more structured assignments with more deadlines to focus his attention.

The supervisor consults with the HR director, telling her that he thinks there is a special medication that could control the restlessness. The HR director appropriately rejects the supervisor's suggestion and recommends that the supervisor begin providing more structured assignments while she requests medical documentation from the employee confirming the side effect. Once confirmed, the HR director finds a vacant cubicle in a quiet part of the office which, together with the more structured assignments, resolves the issue.

QUESTIONS PERTAINING TO BOTH PERFORMANCE AND CONDUCT ISSUES

13. Should an employer mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so?

Generally, it is inappropriate for the employer to focus discussion about a performance or conduct problem on an employee's disability. The point of the employer's comments should be a clear explanation of the employee's performance

deficiencies or misconduct and what he expects the employee to do to improve. Moreover, emphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer "regarded" (or treated) the individual as having a disability.

Practical Guidance: It is generally preferable that the employee initiate any discussion on the role of the disability. Ideally, employers should discuss problems before they become too serious in order to give the employee an opportunity as soon as possible to address the employer's concerns.

Practical Guidance: An employee who is on notice about a performance or conduct problem and who believes the disability is contributing to the problem should evaluate

whether a reasonable accommodation would be helpful. An employee should not assume that an employer knows about a disability based on certain behaviors or symptoms.

Nor should an employee expect an employer to raise the issue of the possible need for reasonable accommodation, even when a disability is known or obvious.

14. When discussing performance or conduct problems with an employee who has a known disability, may an employer ask if the employee needs a reasonable accommodation?

Yes. An employer may ask an employee with a known disability who is having performance or conduct problems if he needs a reasonable accommodation. Alternatively, an employer may prefer to ask if some step(s) can be taken to enable the employee to improve his performance or conduct without mentioning accommodation or the employee's disability.

Practical Guidance: In order to have a productive discussion about whether reasonable accommodation might be needed, it may be helpful if the employer first is clear with the employee about the performance or conduct issue and what the employee needs to do to improve.

- Example 25: A supervisor knows that an employee has failing eyesight due to macular degeneration. The employee does not want to acknowledge his vision problem, even though the supervisor points out mounting errors that seem connected to the deteriorating vision. The supervisor enjoys working with the employee and knows he is capable of good work, but is uncertain how to handle this situation.

The supervisor may ask the employee if there is anything she can do to assist him. Because the supervisor knows about the deteriorating eyesight, she may (but is not required to) ask if the employee needs a reasonable accommodation, such as magnifying equipment, software that reads material from a computer screen, or large print.

However, the supervisor cannot force the employee to accept an accommodation. If the employee refuses to discuss a reasonable accommodation, the supervisor may continue to address the performance problem in the same manner that she would with any other employee.

15. Does an employer have to provide a reasonable accommodation to an employee

with a disability who needs one to discuss a performance or conduct problem?

Yes. An employer might have to provide a reasonable accommodation to enable an employee with a disability to understand the exact nature of any performance or conduct problem and to have a meaningful discussion with the employer about it.

- Example 26: A supervisor knows that a deaf employee who has previously requested reasonable accommodation cannot lip read. Nonetheless, the supervisor approaches the employee and begins verbally discussing mistakes she has been making. The supervisor has violated the ADA by not providing an effective reasonable accommodation to have a meaningful discussion with the employee. Possible accommodations include a written exchange (e.g., e-mails) if the mistakes are simple ones to address and the discussion is likely to be short and straightforward, or a sign language interpreter if the discussion is likely to be lengthy and complex.

Similarly, an employer may need to provide reasonable accommodation to enable an employee with a disability to participate in a performance review. Even if there are no performance problems, the employee is entitled to the same opportunity as a non-disabled employee to discuss his performance.

- Example 27: A blind employee asks for her performance review in Braille. Her supervisor would prefer to read the review aloud instead. All other employees get a written copy of their review. The supervisor's suggestion is not an effective accommodation because it would not permit the blind employee to read the performance review when she wants like other employees. The employer must provide a reasonable accommodation (absent undue hardship) that allows the employee to read the review, and this may include a Braille copy or a version in another format that the employee is capable of reading on her own (e.g., an electronic version).

An employer also may need to provide a reasonable accommodation to enable an employee with a disability to participate in an investigation into misconduct, whether as the subject of the investigation or a witness, to ensure the employee understands what is happening and can provide meaningful input.

- Example 28: A deaf employee at a federal agency is involved in an altercation with a coworker. Because of the uncertainty about each employee's role in the altercation, agency officials initiate an investigation but deny the employee's request for a sign language interpreter when they come to interview him and instead rely on an exchange of notes. Although there were some answers the employee gave that the officials would have followed up on if the communication was oral, they did not do so because of the difficulty of exchanging handwritten notes. Thus, the accommodation is not effective because it hampers the ability of the parties to communicate fully with each other. Effective communication is especially critical given the seriousness of the situation and the potentially high stakes (disciplinary action may be imposed on this employee or the coworker). The agency should have postponed the interview until it could get an interpreter.

SEEKING MEDICAL INFORMATION WHEN THERE ARE PERFORMANCE OR CONDUCT

PROBLEMS

16. May an employer require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination?

Sometimes. The ADA permits an employer to request medical information or order a medical examination when it is job-related and consistent with business necessity. Generally, this means that the employer has a reasonable belief, based on objective evidence, that an employee is unable to perform an essential function or will pose a "direct threat" because of a medical condition.63 The scope and manner of any inquiries or medical examinations must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat.

An employer must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee's performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.

- Example 29: An employee with no history of performance or conduct problems suddenly develops both. Over the course of several weeks, her work becomes sloppy and she repeatedly misses deadlines. She becomes withdrawn and surly, and in meetings she is distracted and becomes belligerent when asked a question. When her supervisor starts asking her about her behavior, she responds with answers that make no sense.

The sudden, marked change in performance and conduct, the nonsensical answers, and the belligerent behavior all reasonably suggest that a medical condition may be the cause of the employee's performance and conduct problems. This employer may ask the employee medical questions (e.g., are you ill, have you seen a doctor, is there a medical reason for the sudden, serious change in your behavior). The employer also may, as appropriate, require the employee (1) to go to an Employee Assistance Program (EAP); (2) to produce medical documentation that she is fit to continue working (including the ability to meet minimum performance requirements and exhibit appropriate behavior); and/or (3) to undergo an appropriate medical examination related to the performance and conduct issues.

The employer also may take a number of actions while it awaits medical documentation on whether she is able to continue performing her job, including placing the employee on leave.

Not all performance problems or misconduct will justify an employer's request for medical information or a medical examination. An employer cannot require a medical examination solely because an employee's behavior is annoying, inefficient, or otherwise unacceptable. In fact, there may be other reasons that an employee experiences performance or conduct problems that are unrelated to any medical condition, such as insufficient knowledge, conflict with a supervisor or coworker, lack of motivation or skills, a poor attitude, or personal problems (such as a divorce or other family problems).

- Example 30: A supervisor finds an employee asleep at his desk. She wants to

send the employee for a medical examination. However, there could be many reasons the employee is asleep. The employee may work a second job, stay up late at night, or have family problems that are causing him to lose sleep. Because there is insufficient evidence to focus on a medical cause for this behavior, requiring the employee to produce medical documentation or to undergo a medical examination would not be justified. However, if the employee when asked to explain his behavior reveals that the cause is a medical problem (e.g., sleep apnea), then the employer would have sufficient objective evidence to justify requesting additional medical information or a medical examination.

- Example 31: An employee with Parkinson's disease has constant run-ins with his supervisor, including ignoring instructions, taking extra breaks, and using disrespectful language. Although the employer may discipline the employee for these acts of insubordination, no evidence suggests that this behavior stems from his Parkinson's disease. Therefore, the employer may not ask the employee for medical information or order him to have a medical examination.

17. Must an employer who has a sufficient basis for requesting medical information or requiring a medical examination take such steps instead of imposing discipline for poor performance or conduct?

No. The ADA permits but does not require an employer to seek medical information. An employer may choose to focus solely on the performance or conduct problems and take appropriate steps to address them.

Practical Guidance: Even when the ADA permits an employer to seek medical information or require a medical examination, it still may be difficult to determine if that is an appropriate course of action. It is advisable for employers to determine whether simply addressing the problem without such information will be effective.